Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

JUN ZHANG,

*Petitioner,*

v.

JOHN ASHCROFT,
ATTORNEY GENERAL OF THE UNITED STATES,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

JIM LI, ESQUIRE
*Attorney for Petitioner*
401 Broadway, Suite 1705
New York, NY 10013
(212) 334-7200

November 11, 2004

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## QUESTIONS PRESENTED

1. Did the court below err and conflict with the well-founded fear test set up in *INS v. Cardoza-Fonseca*, 480 U.S. 421 by affirming the Board of Immigration Appeals' reasoning that the absence of past persecution weighted against finding a well-founded fear of persecution upon Mr. Zhang's (Petitioner) return to his home country, China?

2. Did the court below, by finding that Mr. Zhang would have no fear of persecution because he left China legally, conflict with the standard set up by the UN High Commissioner for Refugees and other Circuit Courts?

3. Did the court below violate due process of law by erroneously interpreting the testimonial and documentary evidence in the record and denying the asylum application based on such erroneous interpretation?

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is an unreported decision issued on June 3, 2004, Docket No. 03-60565, and appears in Appendix to this Petition at App. 1-4. Petitioner filed a request for rehearing on July 19, 2004. The Fifth Circuit denied Petitioner's request for rehearing on August 13, 2004 also in an unreported decision (App. 27).

## JURISDICTION

The Court of Appeals denied Petitioner's request for rehearing on August 13, 2004. This Petition for a Writ of Certiorari is filed within the 90 day jurisdictional period as provided by Supreme Court Rule 13. Supreme Court jurisdiction arises under 28 U.S.C. §1254.

## STATUTORY PROVISION INVOLVED

Refugee Definition, 8 U.S.C. §1101(a)(42), Immigration and Nationality Act, §101(a)(42)(A):

> "The term of refugee means
>
> (A) any person who is outside any country of such person's nationality or, in the case of a person having not nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

Nonrefoulement of Persons in Danger of Subjection to Torture, §2242 of the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, Div. G, Oct. 21, 1998:

> "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."

## STATEMENT OF THE CASE

### 1. Petitioner's undisputed claim.

Petitioner, Mr. Jun Zhang, is a national of the People's Republic of China. Mr. Zhang was a businessman before he left China. He came to the United States with a visitor visa on June 25, 1999. He applied for asylum affirmatively soon after he entered the United States under section 208 of the Immigration and Nationality Act ["Act" hereinafter], withholding of removal under section 241(b)(3)(B) (former section 243(h)) of the Act, and withholding under Convention against torture, 8 C.F.R. §208.16. His asylum application was denied by the asylum office of the legacy Immigration and Naturalization Service (INS). The INS referred his asylum application to the Immigration Court and placed him in removal proceedings by issuing him a Notice to Appear.

Mr. Zhang's asylum claim was based on his political opinion. In 1991, he wrote a letter to the U.S. Embassy in Beijing and donated $50 to the U.S. government in support of the war led by the American troops against Iraq. The then Ambassador James Lilley delivered him a thank

you letter with a pin of the Chinese and American flags. He kept the letter and pin in a deposit box at his office. Only Mr. Zhang and his assistant manager had access to the deposit box. However, the pin and Ambassador's letter disappeared later.

Mr. Zhang's problem started on or about 1997. In March of 1997, Mr. Zhang reported to the police that his assistant manager embezzled money from his company. The police arrested the assistant manager. However, the assistant manager got released through the corruption of high government officials. The assistant manager then took revenge on Mr. Zhang by reporting to the police authorities that Mr. Zhang contacted the U.S. Ambassador as evidenced by the Ambassador's thank you letter. James Lilley, U.S. Ambassador, was publicly scorned as a spy of the U.S. Government and the enemy of the Chinese people by the Chinese government-controlled newspapers.

Mr. Zhang who previously had been a police officer learned from a police colleague in China that the state security department was in possession of Ambassador James Lilley's letter and was investigating him. His friend also told him that the Chinese government viewed Ambassador Lilley as a spy and that his letter and donation had been construed as support of the enemy. Mr. Zhang was watched and followed by two police cars after Ambassador Lilley's letter was missing.

Mr. Zhang obtained some evidence (tape recording and telephone number list) about the corruption of high officials in his assistant manager's case and wrote a letter to whistle-blow this matter. He sent about 3,000 copies of the letter to the representatives of the National Congress of the

People's Representatives. The representatives transferred the letter to the related disciplinary department and prosecution office. However, the relative agencies tried to cover the story because it involved some high officials. So the authorities tried to trace the evidence and dismissed some officers who got involved in the tape recording and telephone number list. At the same time, the disciplinary committee of the Beijing Government and the prosecution office separately had a talk to Mr. Zhang, warning him not to criticize the government in disclosing corruption and also requested him to disclose the source of the evidence. He refused to do so.

After he sent out about 3,000 disclosing letters, Mr. Zhang received the mysterious calls he believed from the corruptive officials whom he blew the whistle on. The caller informed Mr. Zhang that he was being followed and said: "if we get you, we are going to kill you." App. 20. The officer in charge of the corruption case disappeared after he was questioned for the source of the evidence for the corruption case.

At the end of April or May of 1999, Mr. Zhang learned from his former colleague, Jianzhong Wang, that the police department, under the order of the top officials of the Communist Party of China, was setting him up to arrest him for contact with the American Ambassador and whistle blowing activists. Mr. Zhang then arranged to leave China. He then left China legally on June 25, 1999. He credibly testified that he could legally leave China because he gave 5,000 yuan (Chinese currency, about $600.00 USD) to the officer in charge of issuing the passport and, at the time when the passport was issued, the

government was distracted by its crackdown on the Falun Gong spiritual movement. App. 21-22.

Three police officers went to his home to look after him after he left China. The police officers told his wife that Mr. Zhang is suspected of having committed a crime against national security and he would be arrested no matter where he went. App. 22. Mr. Zhang's wife no longer lived at home because she feared for her safety.

Mr. Zhang had registered two companies in China. The police also visited one of his companies after Mr. Zhang left China. The police officers questioned the company official about Mr. Zhang's whereabouts and they searched Mr. Zhang's desk. Nevertheless, the companies were not closed by the government after he left China because Mr. Zhang did not have control over either of them. He received no benefits or payments and the company officials did not listen to him because they knew that Mr. Zhang was afraid to return to China. *Id.*

**2. Decision of the Immigration Judge (App. 14-26).**

The Immigration Judge (IJ) held the merits hearing on December 21, 1999. The merits hearing proceeded the whole morning and half of the afternoon. Although there were some translation difficulties, the IJ stated that she understood the testimony and made the full notes. The IJ did not deliver an oral decision after the testimony. Instead, the IJ delivered a written decision upon review of the whole record, including the testimony and documents eight months after the merits hearing.

As a first instance adjudicator, the IJ observed the demeanor of Mr. Zhang, heard the testimony, and reviewed

whole documents. Her restatement of the facts is consistent with the whole record. Her findings of the facts are supported by the record although we would not accept her legal analysis and conclusion about Mr. Zhang's eligibility of asylum.

She found that Mr. Zhang was a credible witness. She found that Mr. Zhang faced a danger of arrest upon his return to China. "In all probability Respondent (Mr. Zhang) will be arrested upon his return to China." App. 25.

With regard to the ability to leave China legally, the IJ found that Mr. Zhang "offered three reasons he was able to procure a Chinese passport in spite of his persona no gratis status with the government. First he has no relatives living in the United States. Second, he gave 5,000 yen to the person in charge of issuing the passport. Third, at the time the passport was issued the government was distracted by its crackdown on the Falun Gong spiritual movement." App. 21-22.

With regard to Mr. Zhang's business in China, the IJ correctly restated that the two companies have not been closed by the government because (1) neither has broken any law and (2) Mr. Zhang "no longer controls either company. He received no benefits or payments, and his employees do not listen to him because they know he is afraid to return to China." App. 22.

However, the IJ raised a legitimate question on eligibility of asylum: Mr. Zhang would be prosecuted or persecuted? The IJ found that Mr. Zhang faced prosecution, not on account of political opinion. She found that "writing a letter to the American Embassy expressing support of the operation in Kuwait [Iraq] does not establish a political opinion antithetical to that of China, a

country not involved in the conflict. Additionally, whistle blowing doest not establish a political opinion antithetical to that of the CCP." App. 24. Accordingly, Mr. Zhang was found not eligible for asylum.

On the other hand, however, relying on the deep belief that Mr. Zhang was facing the danger of arrest upon his return to China, in consideration of the country's conditions on torture, the IJ granted the application for withholding under the Convention against Torture. The IJ cited the U.S. Department of State 1999 Country Report on Human Rights Practices for China that "police and other elements of the security apparatus employ [ ]torture and degrading treatment in dealing with detainees and prisoners." Methods of torture include electric shocks, prolonged periods of solitary confinement, incommunicado detention, beatings, and shackles. App. 25.

### 3. Decision of the Board of Immigration Appeals (App. 5-13).

The Immigration Judge's decision was appealed to the Board of Immigration appeals (BIA, Board) by the INS, opposing IJ's granting application under Convention Against Torture. Mr. Zhang cross-appealed, disagreeing the denial of the asylum and withholding of removal. The BIA, however, over the dissent of Board member Villageliu, relying on the Government's argument, shifted the legal issue from "prosecution v. persecution" to the reasonable likelihood of future persecution. The BIA did not believe that Mr. Zhang would face the persecution upon his return to China and, accordingly, the BIA affirmed the

IJ's ultimate decision of the denial of asylum application. The key analysis of the Board is drawn as following:

> "However, we find it unlikely that a government intent on persecuting the respondent would issue him a passport and allow him to leave the country in an orderly fashion. The government had ample opportunity to persecute the respondent had it possessed the desire and intent to do so, and it need not have engaged in subterfuge to trump up charges against him. If the respondent was not persecuted for his acts prior to his leaving China, we find it difficult to believe that the government, now several years later, would persecute him on account of his political opinion or any of the other protected grounds." App. 6.

For the torture claim, the Board vacated the IJ's decision based on the same theory that Mr. Zhang would not face the arrest. The Board also cited INS's notes in the brief that the Chinese government investigates and prosecutes when appropriate complaints of torture, which rebuts the Immigration Judge's finding that essentially all detainees in Chinese facilities are subject to torture. App. 7.

**4. Decision of the U.S. Court of Appeals for the Fifth Circuit (App. 1-4).**

Mr. Zhang timely filed the Petition for Review with the U.S. Court of Appeals for the Fifth Circuit. The Circuit Court delivered an unpublished opinion on June 3, 2004. The Circuit Court concluded that "[w]e have reviewed the administrative record and cannot say that the BIA's determination that Zhang does not face a well-founded fear of persecution is unsupported by substantial evidence.

The evidence would not compel any reasonable factfinder to find such a fear of persecution. Insofar as the BIA noted the absence of past persecution, we see no error in finding reasoning that the absence of past persecution weighed against finding a well-founded fear of persecution upon Zhang's return to China." App. 3.

As to the Convention Against Torture claim, the Circuit Court also questioned whether this claim was preserved for the review since the entire argument in Zhang's opening brief regarding this claim is one sentence long.[1] Assuming this issue was not waived, the Circuit Court held that the BIA did not err in finding that Zhang did not establish that he was more likely than not to face torture upon his return to China. The absence of past torture is relevant to this determination. App. 4.

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[1] By reviewing the whole record, Mr. Don Forester, Esquire, Mr. Zhang's counsel before the BIA and the Fifth Circuit, provided Mr. Zhang with ineffective assistance of counsel. His two briefs in Circuit Court and the Board were helpless to the courts below. In the brief submitted to the Board, Mr. Forester just cited some law on eligibility of asylum, without raising any issue or properly arguing on the issue raised by the IJ and the INS. For instance, the IJ raised the issue of "prosecution v. persecution" in her decision, believing that Petitioner was fearing a prosecution which is not on account of political opinion or any other numerated categories of the protection by the asylum law of the United States. Mr. Forester did not argue on this issue in his brief. However, when the Board shifted its issue in this case from "prosecution or persecution" to the reasonable possibility of future persecution, Mr. Forester went back to the IJ's decision and argued at length that Mr. Zhang would be persecuted on account of his political opinion. It seems that Mr. Forester did not even read the Board's decision because he did not know why his appeal on Mr. Zhang's behalf was dismissed by the Board. Obviously, because of Mr. Forester's token job in his briefs to the BIA and Fifth Circuit, the BIA and the Fifth Circuit delivered their decisions by largely relying on the government's briefs.

Mr. Zhang requested a panel rehearing, but his request was denied by the Circuit Court without opinion on August 13, 2004. App. 27.

## REASON FOR GRANTING THE PETITION

### 1. The Circuit Court's decision is in conflict with the United States Supreme Court's construction on the "well-founded fear" – the reasonable possibility standard governing eligibility of asylum, set up in *INS v. Cardoza-Fonseca*, 480 U.S. 421.

In *INS v. Cardoza-Fonseca*, 480 U.S. 422 (1987), this Court set up the well-founded fear standard governing eligibility for asylum under section 208(a) of the Act, which is more generous than the clear probability standard governing withholding of deportation under former section 243(h) of the Act. This Court noted that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place," *Id.* at 431.

Based on the ruling in *Cardoza-Fonseca*, the BIA set up a four-prong test for the well-founded fear in *Matter of Mogharrabi,* 19 I&N Dec. 439 (1987). The four prongs are: (1) the applicant possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could become aware, that the applicant possesses this belief or characteristic; (3) the persecutor has the capability of punishing the applicant; and (4) the persecutor has the inclination to punish the applicant. *Mogharrabi, id.* at 446.

Since *Cardoza-Fonseca*, the test for well-founded fear has been well developed by several Circuits including the

Fifth Circuit. In order to establish a well-founded fear, an applicant must show that a reasonable person in the same circumstances would fear persecution if removed to his or her home country. The well-founded fear has both a subjective and an objective component. The applicant need not demonstrate that harm already experienced has risen to the level of persecution, or that it probably will, in future, rise to the level of persecution, but that there is a reasonable likelihood that it may reach that level. *See Abdel-massieh v. INS*, 73 F.3d 579 (5th Cir. 1996).

Obviously, as a general rule, BIA's reasoning in this case that absence of past persecution weighed against the finding of well-founded fear in future persecution conflicts with the above-referenced well-founded fear standard governing asylum claims.

As a case-specific reasoning, the BIA's conclusion is also not supported by the record and in conflict with *Cardoza-Fonseca* and its own rules in *Mogharrabi*. In the dissent opinion, the Board member Villageliu analyzed the case from each prong of *Mogharrabi* and concluded that "the applicant meets the *Mogharrabi* test as well as the greater than ten percent likelihood for a reasonable fear of persecution which the Supreme Court prescribed in *INS v. Cardoza-Fonseca*, *supra*, 480 U.S. 421, 432 (1987)." App. 12.

From the objective aspect of the reasonable fear criteria, the majority of the BIA did not consider the following facts in reasoning: 1) Mr. Zhang was watched and followed for a period of six months after U.S. Ambassador Lilley's letter was missing; 2) he received the mysterious calls threatening to kill him after he sent out about 3,000 whistle blowing letters, the calls he believed from

the hands of corruptive high officials he disclosed; 3) the officer in charge of the corruption case disappeared after he was questioned for the source of the evidence for the corruption case he was disclosing; 4) he learned that the police department was ordered to set him up to arrest him; 5) he left China soon after he obtained the credible information that the police were to entrap him (he learned the information in April of 1999 and left in the 25th of June of 1999); 6) the police went to his home and company to look for him 20 days after he left China, alleging that he committed crimes against the state security.

Mr. Zhang's fear is subjective, genuine and objectively reasonable. *Mikhael v. INS*, 115 F.3d 229, 304 (5th Cir. 1997). He had been a policeman. From his former colleagues in the police department, he obtained the credible information regarding the investigation of him and the plan to entrap him. From his police career history, plus the events enumerated above, there is a showing of credible, direct, specific evidence that a reasonable person would fear persecution. *Francois v. INS*, 283 F.3d 926, 930 (8th Cir. 2002).

The reasoning of no well-founded fear of future persecution from the existence of past harm is speculative and conjectural. The Board's concern that why the Chinese government would have to entrap him is beyond our guess. Further, the lengths of staying in the home country without harm is essential for the case reasoning. In this case, there were only about three months from Mr. Zhang's spreading complaint letters to his leaving. No government's action in a reasonable period of time in the past does not necessarily reason that the government would not

take any action in the future. *See Damaize-Job v. INS*, 787 F.2d 1332, 1336 (9th Cir. 1986) [remained 2 years], *Turcio v. INS*, 821 F.2d 1396, 1402 (9th Cir. 1987).

**2. The court below, in reasoning that the legal departure from the home country was an indication of absence of fear, is in conflict with the United Nations High Commissioner for Refugees' standard in this regard, which has been accepted by the Circuit Courts.**

The BIA concluded that Mr. Zhang would not be harmed upon his return to China because the government of China issued a passport to Mr. Zhang and he left China "in an orderly fashion." App. 6.

The Fifth Circuit affirmed this finding. However both the BIA and the Fifth Circuit overlooked the testimonial evidence and the Immigration Judge's findings that Mr. Zhang could leave China because he paid the officer and the government was distracted from more emergency political persecution against spiritual movement of Falun Gong. App. 21-22. The record shows that he did not leave China "in an orderly fashion."

Even if Mr. Zhang left China "in an orderly fashion," his eligibility for asylum would not be undermined according to the United Nations' High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* of Geneva, January 1992 (UNHCR's Handbook). Paragraph 48 of the UNHCR's Handbook indicates that:

> Possession of a passport cannot therefore always be considered as evidence of loyalty on

> the part of the holder, or as an indication of the absence of fear. A passport may even be issued to a person who is undesired in his country of origin, with the sole purpose of securing his departure, and there may also be cases where a passport has been obtained surreptitiously. In conclusion, therefore, the mere possession of a valid national passport is no bar to refugee status.

Although the *Handbook* lacks the "force of law," this Court has held that it provides "significant guidance" in construing U.S. obligations under the international law on refugees. *INS v. Cardoza-Fonseca*, *supra*, at 439 n.22. In *Cordero-Trejo v. INS*, 40 F.3d 482, 490 (1st Cir. 1994), the First Circuit Court recognizes this principle. See also *Perkovic v. INS*, 33 F.3d 615, 623 n.7 (6th Cir. 1994), as well as *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987).

The U.S. government, the opposition party of this petition, might argue that Mr. Zhang not merely possessed the passport, but also his companies were still operating after he left China. However, this will not be supported by the record. The record shows that the companies were not shut by the government after his leaving because Mr. Zhang did not control them after he left China. App.,22. They were not belonging to him de facto.

### 3. The court below violates Due Process of Law by erroneously interpreting the testimonial and documentary evidence in the record.

This Court has held that due process protections under the Fifth Amendment of the United States Constitution extend to noncitizens who have entered the United States, whether lawfully or unlawfully. *See, e.g., Accardi v.*

*Shaughnessy*, 347 U.S. 260 (1954). Mr. Zhang was admitted to enter the United States.

The Third Circuit in a case held that when an IJ or Board based her or his conclusion on an erroneous interpretation of the testimonial and documentary evidence in the record, it undoubtedly is not supported by substantial evidence. *Dia v. Ashcroft*, 353 F.3d 228 (3rd Cir. 2003). Certainly, violation of substantial evidence rule will violate the due process of law under the Fifth Amendment.

In this case, the Fifth Circuit overlooked the BIA's erroneous interpretation of the testimonial evidence regarding the way of Mr. Zhang's leaving China. As analyzed above, Mr. Zhang left China not "in an orderly fashion." The BIA's conclusion that Mr. Zhang would not be harmed upon his return to China because his companies were still in operation after he left China, as argued above, was not supported by the record. The BIA partially used the evidence, overlooking or missing the explanation that the companies were not controlled by Mr. Zhang any longer. See App. 21-22.

The Fifth Circuit's affirmed BIA's erroneous interpretation on country condition, on human rights practice in China.

The IJ granted the application under the Convention Against Torture because she did recognize the significant likelihood that Mr. Zhang would be arrested and detained upon his return to China. From the Country Report, the IJ found it more likely than not that Mr. Zhang would be subject to torture if he returned to China.

However, the Board found that the country conditions described in the INS' brief "rebutted the Immigration

Judge's conclusion that essentially all detainees in Chinese facilities are subject to torture." App. 6. Further, the BIA states that, according to the INS' brief, Country Report indicates that the Chinese government investigates, and prosecutes when appropriated, complaints of torture.

The government's brief submitted to the BIA used incomplete and selective information of the country report. Particularly, it quotes the Chinese government's own statement, a persecutor's statement. See Administrative Record (AR) at 30. The government's conclusion in the brief does not bear any reasonable basis. Actually it completely conflicts the country's conditions in China by alleging that "the Chinese government is making efforts to protect its citizens against corruption and wrongdoing. The Chinese government is not consenting to its citizens being tortured. Thus, torture is not being carried out with the consent or acquiescence of the government as required in order for respondent to prevail on his claim under Article 3, the convention against Torture." AR30.

The Country Report[2] in the record, however, states that:

> "The law prohibits torture; however, police and other elements of the security apparatus employed torture or degrading treatment in dealing with detainees and prisoners. * * * Person detained pending trial were particularly at risk during pretrial detention due to systemic weaknesses

[2] The U.S. Department of State 1999 Country Report on Human Rights Practices for China.

> in the legal system or lack of implementation of the revised Criminal Law and Criminal Procedure Law. AR202.
>
> Authorities mounted a nationwide crackdown on police corruption and abuses. * * * [H]owever, many police and security officials who are guilty of abuses **go unpunished**.
>
> Conditions in penal institutions for both prisoners and common criminals are generally harsh and frequently degrading.
>
> Government does not permit independent monitoring of prisons or reeducation-through-labor camps, and prisoners remain largely inaccessible to international human rights organizations." AR203

The IJ did not say as to what the Board understood that "essentially all detainees in Chinese facilities are subject to torture." Instead, the IJ pointed out that China appeared to be well aware of the problem. What strikes the IJ is that the government was "slowly attempting to implement change. The Government has, as stated 'goal', the conversion of 'one-half of the nations' prisons and 150 reeducation-through-labor camps into 'modern, civilized' facilities by the year 2010.'" (Mr. Zhang would be tortured before 2010 should he return to China.) The IJ also dissatisfied that "the Government does not allow independent monitoring of prisons." App. 26.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated November 11, 2004

New York, NY

Respectfully submitted this 11th day of November, 2004.

JIM LI, ESQUIRE
*Attorney for Petitioner*
401 Broadway, Suite 1705
New York, NY 10013

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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No. 03-60565

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JUN ZHANG,

Petitioner,

versus

JOHN ASHCROFT, U.S. ATTORNEY GENERAL,

Respondent.

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Petition for review of an Order of the
Board of Immigration Appeals (BIA No. A76 939 781)

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(Filed June 3, 2004)

Before BARKSDALE, EMILIO M. GARZA, and PICKERING, Circuit Judges.

PER CURIAM:*

Jun Zhang has brought this petition for review of the decision of the Board of Immigration Appeals (BIA) ordering his deportation. After Zhang overstayed his visa and the INS instituted these proceedings, Zhang applied for asylum and withholding of deportation, and also sought relief from deportation under the Convention Against Torture.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The Immigration Judge (IJ), after an evidentiary hearing, granted relief under the Convention Against Torture, finding it more likely than not that Zhang would be subject to torture if he were returned to China, but denying plaintiff's request for asylum and withholding of deportation. Both sides appealed to the BIA. The BIA, over the dissent of Board Member Villageliu, agreed with the INS and rejected Zhang's cross-appeal. The majority stated, among other reasons for siding with the INS, that "we find it unlikely that a government intent on persecuting the respondent would issue him a passport and allow him to leave the country in an orderly fashion."

The BIA disagreed with the IJ's conclusion that Zhang would likely face arrest and torture if he returned to China. The IJ's conclusion relied in part on the State Department's China Country Report on Human Rights Practices detailing the use of torture. The BIA, however, questioned why Zhang faces arrest if returned to China, noting that he owns two businesses in China which are still operating in his name, that "the authorities well knew his whereabouts and did not harm him even when he did not cooperate with them when he was questioned," and that "he was never physically or mentally harmed prior to his leaving China." The BIA also noted that the State Department report "reveals that the Chinese government is interested in combating corruption among its officials, even high-ranking persons," and that the report "indicates that the Chinese government investigates, and prosecutes when appropriate, complaints of torture, which rebuts the [IJ's] conclusion that essentially all detainees in Chinese facilities are subject to torture."

Zhang argues that he has a well-founded fear of persecution on account of his political opinions. We review

the BIA's factual findings for substantial evidence. *Efe v. Ashcroft,* 293 F.3d 899, 903 (5th Cir. 2002). The BIA's "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

We have reviewed the administrative record and cannot say that the BIA's determination that Zhang does not face a well-founded fear of persecution is unsupported by substantial evidence. The evidence would not compel any reasonable factfinder to find such a fear of persecution. Insofar as the BIA noted the absence of past persecution, we see no error in reasoning that the absence of past persecution weighed against finding a well-founded fear of persecution upon Zhang's return to China. Insofar as the BIA considered the State Department country report, we have noted that these reports are the "most appropriate and perhaps the best resource . . . to obtain information on political situations in foreign nations." *Rojas v. INS,* 937 F.2d 186, 190 n.1 (5th Cir. 1991).

Insofar as Zhang separately sought withholding of deportation, as a general rule if the petitioner fails to meet the well-founded fear standard for asylum, he does not meet the higher standard for withholding of deportation. *See Efe,* 293 F.3d at 906; *Jukic v. INS,* 40 F.3d 747, 749-50 (5th Cir. 1994).

As to the Convention Against Torture, we question whether this claim has been preserved for our review, since the entire argument in Zhang's opening brief regarding this claim is one sentence long. *See Dardar v. Lafourche Realty Co.,* 985 F.2d 824, 831 (5th Cir. 1993) ("Questions posed for appellate review but inadequately briefed are considered abandoned."); *Webb v. Investacorp,*

*Inc.*, 89 F.3d 252, 257 n.2 (5th Cir. 1996) (holding that an appellant waives all issues not raised and argued in the initial brief on appeal). Assuming this issue was not waived, we cannot say that the BIA erred in finding that Zhang did not establish that he was more likely than not to face torture upon his return to China. *See Efe*, 293 F.3d at 907; 8 C.F.R. § 208.16(c)(2) (2003). The absence of past torture is relevant to this determination. *Id.* § 208.16(c)(3)(i).

PETITION DENIED.

**U.S. Department of Justice**
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A76 939 781 – Houston Date: MAR 31 2003

In re: JUN ZHANG

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Don A. Forester, Esquire

ON BEHALF OF SERVICE:
Cara Wilkins, Assistant District Counsel

This case involves a cross-appeal from an Immigration Judge's decision, dated August 22, 2000. The respondent, a native and citizen of China, appealed the denial of asylum, and withholding of removal. The Immigration and Naturalization Service appealed the grant of relief pursuant to the Convention Against Torture (CAT). The respondent's appeal will be dismissed. The Service's appeal will be sustained.

We affirm the Immigration Judge's determination that the respondent failed to meet his burden of establishing that he is a refugee within the meaning of the Immigration and Nationality Act, and that he has not met the standard for eligibility for withholding of removal. The respondent reportedly wrote a letter of support in 1991 to the United States Embassy in Beijing, with which he donated money in support of this country's efforts in Kuwait. In 1996, the respondent allegedly reported his assistant manager to police for embezzlement. In 1999, the respondent reportedly wrote letters to the Peoples'

Congress, protesting corruption in party leadership. These acts naturally brought the respondent to the attention of Chinese authorities, who allegedly detained and questioned him on several occasions, had him followed, and threatened him. However, the respondent refused to cooperate with demands made upon him, he was never harmed, and he was eventually released. Only after the respondent allegedly learned that the government was planning to frame him in a crime to discredit him did he obtain a passport and leave the country.

However, we find it unlikely that a government intent on persecuting the respondent would issue him a passport and allow him to leave the country in an orderly fashion. The government had ample opportunity to persecute the respondent had it possessed the desire and intent to do so, and it need not have engaged in subterfuge to trump up charges against him. If the respondent was not persecuted for his acts prior to his leaving China, we find it difficult to believe that the government, now several years later, would persecute him on account of his political opinion or any of the other protected grounds.

The Immigration Judge, in granting CAT relief, recognized the "significant likelihood" that the respondent would be arrested and detained upon his return to China. Citing information contained in a report of record, published by the State Department's Bureau of Democracy, Human Rights, and Labor (BDHRL), regarding the use of torture and degrading treatment, the Immigration Judge concluded that it was more likely than not that the respondent would be tortured. However, it is not clear to us why the respondent faces arrest upon his return to China. The respondent owns two businesses in China which are still operating in his name; the authorities well knew his whereabouts and did not harm him even when he did not cooperate with

them when he was questioned; and he was never physically or mentally harmed prior to his leaving China. The BDHRL information also reveals that the Chinese government is interested in combating corruption among its officials, even high-ranking persons. We find it unlikely that the Chinese government would torture the respondent, or acquiesce in his torture by others, because he contributed $50.00 to the United States in support of Operation Desert Storm, because he reported a subordinate for embezzlement, or because he wrote letters of complaint to Peoples' Congress officials 4 years ago. Further, as the Service notes in its brief, the BDHRL information also indicates that the Chinese government investigates, and prosecutes when appropriate, complaints of torture, which rebuts the Immigration Judge's conclusion that essentially all detainees in Chinese facilities are subject to torture.

Consequently, we conclude that the respondent has not met the criteria for eligibility for CAT relief pursuant to 8 C.F.R. §§ 1208.16-1208.18. The Immigration Judge's decision will be vacated to the extent that it grants such relief.

ORDER: The Service's appeal is sustained.

FURTHER ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The Immigration Judge's decision is vacated to the extent that it grants relief pursuant to 8 C.F.R. §§ 1208.16-1208.18.

FURTHER ORDER: The respondent shall be removed to China.

/s/ Ryan D. Pauly
FOR THE BOARD

*DISSENTING OPINION*: Gustavo D. Villageliu, Board Member

I respectfully dissent.

In my opinion the applicant has established a well-founded fear of persecution, and in view of the level of political repression in China I would grant his application for asylum in the United States. I disagree with the majority's conclusion that despite the fact that the applicant was detained and questioned several times for writing letters criticizing Chinese government corruption, supporting the United States in the 1991 Gulf War, and donating money to the 1991 war effort, he does not have a well-founded fear of persecution in China in view of the Chinese government's present opposition to the United States current effort to liberate Iraq.

In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1981), the Supreme Court held that there is a significant difference between the section 208(a) and section 243(h) standards for relief, and that an asylum applicant need not show a likelihood of persecution in order to establish eligibility for section 208(a) relief. We stated in *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987), that "an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution," and we adopted this "reasonable person" standard for the adjudication of asylum cases. The applicant must establish that he possesses a belief or characteristic a persecutor seeks to overcome by means or punishment; that the persecutor is already aware or could become aware that the alien possesses this belief or characteristic; and that the persecutor has the capability and inclination to punish the alien. *Id.* at 446. The alien's

testimony may suffice if it is believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis for his fear. *Id.* at 445.

The Immigration Judge listened to the applicant's testimony, and found it credible. *See Matter of A-S-*, Interim Decision 3336 (BIA 1998). Nonetheless, he found that the applicant had failed to establish a well-founded fear of persecution for purposes of asylum, and therefore, had also failed to establish eligibility for withholding of deportation. The majority agrees the applicant had not established past persecution or that he has a well-founded fear of persecution.

As stated above, the credibility of the applicant's testimony is apparently undisputed. The capability and inclination of the present Chinese government to persecute its opponents is also undisputed. The 2001 Country Reports on Human Rights Practices states that the Chinese government's human rights record throughout the year remained poor and the Government continued to commit numerous and serious abuses. Authorities still were quick to suppress any person or group, whether religious, political, or social, that they perceived to be a threat to government power, or to national stability, and citizens who sought to express openly dissenting political and religious views continued to live in an environment filled with repression. Persons critical of official corruption or malfeasance also frequently were threatened, detained, or imprisoned.

In January, Supreme People's Court President Xiao Yang stated that political dissent and outlawed religions would be among the top targets of a stepped-up crackdown by authorities during the year . . . newspapers cannot

report on corruption without government and Party approval, and publishers published such material at their own risk. In December 2000, Jiang Weiping, a reporter for the Hong Kong-based Wen Wei Pao newspaper, was detained for writing stories alleging that authorities had covered up several embezzlement schemes in Liaoning Province. In June authorities announced Jiang would be tried for leaking state secrets. In July Yao Xiaohong, director of the news department of the Dushi newspaper in Jiangxi province, was fired for reporting that local officials had removed the kidneys from an executed convict without his prior consent.

In recent years, journalists were harassed, detained, and threatened often for reporting on subjects that met with the Government's or local authorities' disapproval, including corruption. In May Central Committee Propaganda Department officials severely criticized the editorial staff of Guangzhou's widely read newspaper, Southern Weekend, and forced its management to fire two senior editors for publishing exposes of corruption. Some believe that the actions against Southern Weekend were taken in response to complaints from provincial Party propaganda chiefs in other parts of the country angered by corruption exposes in their provinces. Southern Weekend's investigative reporting and critical editorials have resulted in several actions against it by the authorities in the past. In July, reportedly in response to publishing criticisms of CCP General Secretary Jiang Zemin's plans to allow entrepreneurs into the Communist Party, the Central Party Propaganda Department suspended publication of the leftist journals Pursuit of Truth and Mainstay. Consequently, these two prongs of the *Mogharrabi* test are

easily met. The government of China has both the present inclination and capability to punish its dissidents.

Another of the *Mogharrabi* factors, a belief or characteristic of the alien that the Chinese government seeks to overcome by punishment is easily met in this case. Whether or not we agree that the applicant's prior detentions and questioning arose to the level of persecution, it is clear that it was because of his anti-corruption political opinions and pro-American beliefs as evidenced by his exercise of the basic freedom of expression. Finally, in view of his having been singled out for such detentions and questioning, the last *Mogharrabi* test is met since the Chinese government already knows or could become aware of the applicant's opinion. Given the Chinese government's strong opposition to our governments desire to liberate Iraq the applicant would appear to meet the higher test for asylum prescribed by this Board prior to *Cardoza-Fonseca* in *Matter of Acosta*, 19 I&N Dec. 211, 226 (BIA 1985). The Chinese government already knows or could easily become aware of the applicant's pro-American political opinion.

The question before us is not only whether the treatment the respondent already suffered amounted to past political persecution. The question before us is also whether given these facts, the applicant has a well-founded fear of future persecution if he is forcibly returned to China after his asylum application is denied in view of the continued history of political repression of dissent noted in the 2001 Country Reports. China continues to be a country whose government's policy is to seek and punish its dissidents through a massive internal security apparatus.

The level of repression inflicted upon the applicant in the past is not a ceiling limiting the level of harm he may suffer in the future, and eligibility for asylum may also be established by a well-founded fear of future persecution. In order to establish such a well-founded fear an applicant need not demonstrate that harm already experienced risen to the level of persecution or that it probably will, in future, rise to the level of persecution, but that there is a reasonable likelihood that it may reach that level. *See Abdel-Massieh v. INS*, 73 F.3d 579 (5th Cir. 1996).[1]

After carefully reviewing this record, I conclude that the applicant meets the *Mogharrabi* test as well as the greater than ten percent likelihood for a reasonable fear of persecution which the Supreme Court prescribed in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). "Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country. I enacting the Refugee Act of 1980 Congress sought to give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." *Id.* at 449. The appeal by this Chinese dissident who has

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[1] Although ineligibility for asylum is routinely found because the level of past harm did not rise to the level of persecution, these cases routinely involve claims where due to change of circumstances in the alien's country or remoteness in time of the incident alleged the focus is primarily on the alleged harm already suffered. *See e.g. Abdel-Massieh v. INS*, *supra* (safe haven in Southern Sudan); *Anton v. INS*, 50 F.3d 469 (7th Cir. 1995) (Romanian change of government); *Prasad v. INS*, 47 F.3d 336 (9th Cir. 1995) (Limited interrogation of ethnic Indian immediately after coup in Fiji); *Matter of H-M-*, 20 I&N Dec. 683 (BIA 1993) (Nicaraguan change of government); *Matter of R-R-*, 20 I&N Dec. 547 (BIA 1992) (same Nicaragua).

already been singled out as a supporter of the United States should be sustained and the application for asylum granted. He has a well-founded fear of greater harm in the future on account of his political opinion.

/s/ Gustavo D. Villageliu
Gustavo D. Villageliu
Board Member

**THE UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION COURT HOUSTON, TEXAS**

| | | |
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| **FILE NO: A76 939 781** | ) | |
| | ) | |
| **IN THE MATTER OF:** | ) | **IN REMOVAL** |
| ZHANG, JUN | ) | **PROCEEDINGS** |
| | ) | |
| Respondent | ) | |

**CHARGE:** Section 237(a)(1)(B) of the Immigration and Nationality Act, after admission as a nonimmigrant under Section 101(a)(15), has remained in the United States for a time longer than permitted.

**APPLICATIONS:** Section 208 of the Immigration and Nationality Act-Asylum.

Section 241(b)(3) of the Immigration and Nationality Act-Restriction on Removal.

8 C.F.R. §§ 208.16-208.18 – Article 3 of the Convention Against Torture.

**ON BEHALF OF THE RESPONDENT:**
Jennifer Reynolds, Esquire
YMCA International Services
P.O. Box 740425
Houston, TX 77247-0425

**ON BEHALF OF THE SERVICE:**
Cara Wilkins
Assistant District Counsel
Immigration and Naturalization Service
P.O. Box 670049
Houston, TX 77267-0049

## AMENDED FINDINGS, DECISION AND ORDERS OF THE IMMIGRATION JUDGE

Respondent is a thirty-seven-year-old native and citizen of China. Respondent was admitted to the United States at San Francisco, California, on or about June 25, 1999 as a non-immigrant B-1 visitor for pleasure with authorization to remain in the United States for a temporary period not to exceed July 24, 1999. Respondent remained in the United States beyond July 24, 1999 without authorization. Respondent submitted an affirmative application for asylum and withholding of removal to the Immigration and Naturalization Service (Service) on July 22, 1999. The Service referred the matter to this Court. Respondent was served with a Notice to Appear (NTA) on September 1, 1999. The NTA charged Respondent with removability pursuant to §237(a)(1)(B) of the Immigration and Nationality Act (INA) as an alien who remained in the United States for a time period longer than permitted.

At a master calendar hearing held on September 29, 1999 Respondent admitted the factual allegations concerning his alienage numbered one through four of the NTA and conceded removability as charged. Because Respondent admitted the allegations and conceded removability, the court found Respondent removable by evidence that was clear and convincing. *See* 8 C.F.R. §240.8(a). Respondent indicated that he would pursue his application for asylum pursuant to INA §208 and for withholding of removal under INA §241(b)(3). Respondent additionally requested consideration for withholding of removal under the Convention against Torture at his merits hearing.

After a full hearing on the merits of Respondent's applications on December 21, 1999, the Court reserved its decision to further review the evidentiary record. For the following reasons, Respondent's applications for asylum and withholding of removal will be denied. Respondent's application for withholding of removal under the Convention Against Torture shall be granted.

## APPLICABLE LAW

### *Asylum*

An applicant for asylum bears the evidentiary burden of proof and persuasion by a preponderance of the evidence to establish that he has been subject to past persecution, has a well-founded fear of persecution, or has a clear probability of persecution within the meaning of sections 208(a) and 241(b)(3) of the Act. 8 U.S.C. §§ 1158(a) and 1231(b)(3) (2000). *See generally INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Chen*, 20 (I&N Dec. 16 (BIA 1989); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The requirement of a "well-founded fear" has been clarified by the Board of Immigration Appeals (Board) to mean that a reasonable person in the alien's circumstance would fear persecution if he were returned to a particular country. *Matter of Mogharrabi, supra* (embracing the decision of *Guerva-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986)). In other words, the applicant's subjective fear of persecution must be objectively reasonable. *Jukic v. INS*, 40 F.3d 747, 749 (5th Cir. 1994).

An applicant must show that the harm suffered or feared in the future was or would be inflicted on account of

his race, religion, nationality, membership in a particular social group, or political opinion. *See* § 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A) (2000) (defining the term "refugee"); *see also*, 8 C.F.R. §208.13 (2000).

It is the duty of the Immigration Judge to determine whether or not the alien is credible. *Vasquez-Mondragon v. INS*, 560 F.2d 1225, 1226 (5th Cir. 1977). A claim of persecution which lacks credibility and veracity cannot satisfy the burdens of proof and persuasion necessary to establish eligibility for asylum. *See generally Matter of Mogharrabi, supra*; 8 C.F.R. §208.13(a).

In further guidance of what is required to meet an individual's burden of proof and to establish a well-founded fear of persecution for asylum, *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), as amended by *Matter of Mogharrabi, supra*, requires that the evidence presented by the alien establish that:

1) the alien possess a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;

2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic;

3) the persecutor has the capability of punishing the alien; and

4) the persecutor has the inclination to punish the alien.

*Matter of Acosta, supra.* It must also be remembered that an alien who succeeds in establishing a well-founded fear of persecution will not necessarily be granted asylum. He must also show that the feared persecution would be on

account of one of the five enumerated grounds, Aliens fearing retribution over purely personal matters, aliens fleeing general conditions of violence and upheaval in their countries, aliens desiring to experience greater economic opportunity or greater personal freedom, or aliens wishing to avoid military service would not qualify for asylum. Such persons may have well-founded fears, but such fears would not be on account of one of the specified grounds. *See Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir 1986).

Finally, the decision on an application for asylum ultimately is a matter of discretion. § 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A)(2000); *see INS v. Cardoza-Fonseca, supra*. Therefore, even if an alien demonstrates eligibility for asylum, he must nonetheless show that he is worthy of a favorable exercise of discretion on the application. *Id.*

*Withholding of Removal*

An alien must show a clear probability of persecution in order to obtain withholding of removal under INA § 241(b)(3). *INS v. Stevic*, 467 U.S. 407 (1984). To establish a clear probability, the alien must demonstrate that persecution is "more likely than not" if he is removed to a country. *Id.* This standard is less generous than the well-founded fear standard that governs asylum. *INS v. Cardoza-Fonseca, supra.*

*Convention Against Torture*

Current regulations, which became effective on March 22, 1999, establish specific procedures for raising a claim for protection under Article 3 of the Convention Against Torture. The applicant must establish that it is more likely

than not that he or she would be tortured if returned to the proposed country of removal. 8 C.F.R. § 208.16(c)(2). Torture is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1). Additionally, "[t]orture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." 8 C.F.R. § 208.18(a)(3). An applicant, however, is not required to demonstrate that he or she would be tortured on account of a particular belief or immutable characteristic. *See Report of the Committee on Foreign Relations, S. Exec. Rep No. 101-30*, at 16 (1990).

## SUMMARY OF THE FACTS

In summary, Respondent testified to the following: He was born in Beijing, China on June 25, 1963. He left China on June 25, 1999 because he feared harm and persecution from the Chinese government.

In January of 1991 he wrote a letter to the U.S. embassy in Beijing and indicated his support of current American military action in Kuwait and Iraq. Enclosed was approximately fifty dollars to support the effort. Several days later he received a telephone call from the embassy and was informed that the ambassador would soon be writing to thank Respondent. Several days later he received a personal letter from ambassador James Lilley and a pin with the Chinese and American flags. Respondent kept said items in a deposit box at his office that only one other person, his assistant manager, had access to.

In 1996 it was discovered that this assistant manager was embezzling money. Respondent reported him to the police and the assistant manager was eventually detained in March of 1997. At this point Respondent discovered that the letter was missing and concluded that the assistant manager must have taken it because he was the only one with access to the box.

In September of 1998, a friend of the Respondent warned him that the Ministry Department was in possession of the letter and investigating him. This friend, a public security officer, informed him that the Chinese government viewed ambassador Lilley as a spy and that his letter and donation had been construed as support of the enemy. This friend informed Respondent that the Ministry Department was likely to arrest him and that be should hide. After this conversation Respondent noticed that he was being followed by two alternating cars. However, the people in those cars never stopped him or talked to him.

In March of 1999 Respondent sent almost three thousand letters to a meeting of the Annual Session of the People's Congress. His letter accused senior leaders of the Chinese Communist Party (C.C.P.) of corruption.

A few days after sending the letters, Respondent received an anonymous phone call. The caller informed Respondent that he was being followed, and said "if we get you, we are going to kill you."

A few days after the phone call, Respondent was contacted by a government official and asked to appear at the Superior Court in regards to the ongoing investigation. When Respondent obliged, two officials attempted to force him to rewrite the letter in which he had criticized the

government. The officials did not use physical force and Respondent refused to rewrite the letter.

Additionally, in March of 1999 the Committee of Discipline for Beijing City Government contacted Respondent and informed him that they were investigating him about the letter he wrote and political corruption. In particular, they wanted to know where and how he had obtained the evidence cited in his letter. Respondent attended two afternoon sessions of approximately four hours. Respondent refused to tell them how he had obtained the evidence[1] and they let him go. He suffered no physical harm but was verbally threatened. Shortly thereafter, the officer in charge of the investigation disappeared.

In May of 1999, Respondent was contacted by an old friend, Jianzhong Wang, a worker for the Department of Public Safety. Mr. Wang told Respondent that he had overhead co-workers discussing how they could entrap Respondent and arrest him for a crime. Apparently, top C.C.P. officials had ordered the police department director to entrap Respondent because of his political opinion, contact with the American ambassador, and whistleblowing activities. Mr. Wang then advised Respondent to procure a passport and leave China.

Respondent applied for a passport and received it on May 20, 1999. Respondent offered three reasons he was able to procure a Chinese passport in spite of his *persona no gratis* status with the government. First, he has no relatives living in the United States. Second, he gave 5,000

[1] The evidence consisted of a tape and a telephone list. How either was used to demonstrate corruption is unclear.

yen to the person in charge of issuing the passport. Third, at the time the passport was issued the government was distracted by its crackdown on the Falun Gong spiritual movement.

Respondent left China on June 25, 1999 and has been in contact with his wife since his arrival in the United States. His wife, Liping Gu, submitted an affidavit stating that on July, 21, 1999, three policemen came to the house looking for Respondent. The police told his wife that Respondent is suspected of having committed a crime against national security and no matter where he goes he will be arrested. She informed them they she had not seen Respondent in over 20 days. Respondent's wife no longer lives at home, she fears for her safety and thus stays at her parent's home or her in-law's home. The government has not sent officials to either of these locations looking for Respondent.

Respondent is currently listed as the registered owner of two companies in China. Both companies are still open and continue to operate in Respondent's absence. The two companies have not been closed by the government because (1) neither has broken any law and (2) and Respondent no longer controls either company. He receives no benefits or payments, and his employees do not listen to him because they know he is afraid to return to China. According to the affidavit of Jinrong Gao, office director for one of Respondent's companies, approximately 20 days after he last saw Respondent, two police officers came by the office inquiring as to Respondent's whereabouts. The officers proceeded to search Respondent's desk before leaving.

## DISCUSSION

### Credibility

Adverse credibility determinations are appropriately based on inconsistent statements, contradictory evidence, and inherently improbable testimony; and where these circumstances exist in view of the background evidence on country conditions, it is appropriate for an immigration judge to make an adverse credibility determination on such a basis. *See generally, In re B-*, 21 I&N Dec. 66 (BIA 1995); *In re S-M-J-*, 21 I&N Dec. 722 (BIA 1997); *Artiga-Turcios v. INS*, 829 F.2d720, 723 (9th Cir. 1987); *Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1986).

In the instant case, the Court finds that Respondent's asylum application is consistent with the testimony given. Respondent maintains in both accounts that as a result of (1) his 1991 letter of support to the U.S. embassy in Beijing, and (2) his 1999 letter to the Annual Session of the People's Congress exposing corruption in the Chinese government, that he fears imprisonment and possible torture if returned to China. While the Statement explains in some instances greater detail, and in some instances less detail, the events which lead to his departure from China, Respondent's testimony reflected the same events. The omission of facts in an asylum application or during testimony might not, in themselves, support an adverse credibility determination. *See Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998). The Court, therefore, concludes that minor discrepancies and omissions between the application, Statement, and Respondent's testimony do *not* provide specific and cogent reasons to determine that Respondent lacks credibility.

**Analysis**

The Respondent has failed to demonstrate that he suffered past persecution. The incidents Respondent described, being followed by cars, receiving anonymous phone calls, and being hauled into court for interrogations, are frightening and unfortunate, but they do not rise to the level of persecution.

The Respondent has also failed to establish that he has a well-founded fear of future persecution. Respondent prays this court to find that criminal charges awaiting him in China constitute prosecution rising to the level of persecution. This court, however, is not persuaded. In *Matter of Sibrun*, the Board determined that when presented a case which involves prospective prosecution for criminal action, it is necessary that the record present evidence that such prosecution is motivated by political opinion. 18 I&N Dec 354, 359 (BIA 1983). It is not clear that Respondent has established a political opinion antithetical to that of the C.C.P. Writing a letter to the American Embassy expressing support of the operation in Kuwait does not establish a political opinion antithetical to that of China, a country not involved in the conflict. Additionally, whistle-blowing does not establish a political opinion antithetical to that of the C.C.P. One who points out the alleged misdeeds of government leaders does not necessarily disagree with the politics of the ruling party, but may merely want to see the government operate correctly. Any investigation into Respondent regarding his alleged whistle-blowing activities can not be deemed to be on account of his political opinion. In fact, the government seems mostly concerned with how Respondent obtained his information, and whether such attainment was in fact legal. Respondent reports that he faces charges of having committed a crime against national security. It appears

that Respondent very well may have infiltrated the Chinese security system and obtained confidential documents. If so, any investigation and arrest would be completely legitimate and not a pretext for persecution. Thus, Respondent is not a refugee as defined by INA § 101(a)(42)(A) and is not eligible for asylum.

Having failed to meet the reasonable possibility of future persecution standard required for a grant of political asylum, Respondent has also failed to meet the "clear probability" standard required for withholding of removal.

*Convention Against Torture*

Respondent qualifies for relief under the Convention Against Torture. This court finds that in all probability Respondent will be arrested upon his return to China. Credible testimony detailing that the police are looking for him has been provided. While this court does not find that prosecution rises to the level of persecution in this case, it does recognize the significant likelihood that Respondent would be arrested and detained upon return to China. The U.S. Department of State 1999 Country Report on Human Rights Practices for China explains that while the law prohibits torture, "police and other elements of the security apparatus employ[] torture and degrading treatment in dealing with detainees and prisoners." *Id. at 6*. Methods of torture include electric shocks, prolonged periods of solitary confinement, incommunicado detention, beatings, and shackles. *Id.* In particular, "[p]ersons detained pending trial [are] particularly at risk during pretrial detention due to systematic weakness in the legal system or lack of implementation of the revised Criminal Procedure Law." *Id.* Most strikingly, China appears to be well aware of the problem and is slowly attempting to implement change.

The Government has, as a stated "goal", the conversion of "one-half of the nations's prisons and 150 reeducation-through-labor camps in to 'modern, civilized' facilities by the year 2010." *Id. at 7-8.* Finally, the Government does not allow independent monitoring of prisons. *Id. at 8.* In light of the above discussion, this court finds it more likely than not that Respondent would be subject to torture if returned to China. Accordingly, Respondent's application for withholding of removal under the Convention Against Torture shall be granted.

**Conclusion**

Upon consideration of all the evidence in the record, the Court shall deny the Respondent's applications for asylum and withholding of removal. The court shall grant respondent's application for withholding of removal under the Convention Against Torture.

Therefore,

IT IS ORDERED that Respondent's application for asylum under INA §208 is DENIED.

IT IS FURTHER ORDERED that Respondent's application for withholding of removal under INA §241(b)(3) is DENIED.

IT IS FURTHER ORDERED that Respondent's application for Withholding of Removal under the Convention Against Torture is GRANTED.

8/22/00
Date

/s/ Clarease Rankin Yates
Clarease Rankin Yates
Immigration Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 03-60565

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JUN ZHANG

Petitioner

v.

JOHN ASHCROFT, U S ATTORNEY GENERAL

Respondent

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Petition for Review of an Order of the
Board of Immigration Appeals

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**ON PETITION FOR REHEARING**

(Filed Aug. 13, 2004)

Before BARKSDALE, EMILIO M. GARZA, and PICKERING, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is Denied

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

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